

EXHIBIT QQQ

In The Matter Of:

*KYLA HANNAH HERSHEY-WILSON v.
NEW YORK CITY*

April 20, 2006

*CONFERENCE
SOUTHERN DISTRICT REPORTERS
500 PEARL STREET
NEW YORK, NY 10007
212-805-0300*

Original File 64kPherM.txt, Pages 1-39

Word Index included with this Min-U-Script®

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[1] 64kPherM
[2] UNITED STATES DISTRICT COURT
[3] SOUTHERN DISTRICT OF NEW YORK
[4] -----X
[5] KYLA HANNAH HERSHEY-WILSON,
[6] Plaintiff,
[7] v. 05 Cv. 7026 (KMK)
[8] NEW YORK CITY, et. al.,
[9] Defendants.
[10] -----X
[11] New York, N.Y.
[12] April 20, 2006
[13] 11:30 a.m.
[14] Before:
[15] HON. KENNETH M. KARAS,
[16] District Judge
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[1] claims of misconduct and other, arguably, privileged
[2] information. And I ended up agreeing with you that Judge
[3] Francis's rulings were not clearly erroneous or contrary to
[4] law. I was just struck by that.
[5] The city gets a five-point demerit for citing an
[6] unpublished Second Circuit decision
[7] **MR. MIRRO:** The Supreme Court ruled --
[8] **THE COURT:** -- the Judicial Conference said that as of
[9] 2007, it is okay to cite unpublished opinions. But just be
[10] careful because there are some people in the building who might
[11] get pretty hot under the collar.
[12] **MR. MIRRO:** We will, your Honor.
[13] **THE COURT:** Quick question for Mr. Dougherty. I will
[14] definitely hear from you, Mr. Meyerson.
[15] What is the standard of review where, what Judge
[16] Francis did was said that my ruling in MacNamara precluded him
[17] from, in effect, agreeing with Mr. Meyerson?
[18] So what we have is a situation, before the case gets
[19] referred to a Magistrate Judge for discovery purposes, I issue
[20] a discovery ruling in another case, albeit, one that's related,
[21] which is why I got a hundred of these things. And Judge
[22] Francis feels bound by that ruling in this case. And then Mr.
[23] Meyerson appeals that ruling.
[24] Is it Rule 72, abuse of discretion and contrary to
[25] law?

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[1] (In open court)
[2] MR. MEYERSON: Good morning, your Honor, James
[3] Meyerson for Ms. Hershey-Wilson.
[4] THE COURT: Good morning, Mr. Meyerson.
[5] MR. DOUGHERTY: Good morning, Jeff Dougherty for
[6] defendants.
[7] THE COURT: You got the call on this one, Mr.
[8] Dougherty.
[9] MR. MIRRO: And James Mirro.
[10] THE COURT: Good morning, your Honor. Again, for the
[11] record. This is becoming a habit. There are worse habits in
[12] life.
[13] I have to say, Mr. Meyerson, I was struck your
[14] reply --
[15] MR. MEYERSON: -- I don't know if that's good or bad.
[16] THE COURT: It's sort of interesting. There is this
[17] sort of righteous speech-like tone to you. You sort of have to
[18] live by the privilege and die by the privilege.
[19] And you are very critical of the city's invocation of
[20] certain privileges relating to their office -- psych testing
[21] records are sought by the plaintiff. And misconduct.
[22] Invariably the city's attorneys object to what I was saying
[23] before; that's true.
[24] You were here six, seven weeks ago when they wanted to
[25] invoke certain privileges having to do with unsubstantiated

[1] **MR. DOUGHERTY:** Your Honor, I would submit that in our
[2] papers to Judge Francis, while I can't determine what it is
[3] that, you know, ultimately determined his rationale, that we
[4] did submit case law as well as transcripts from your ruling in
[5] MacNamara. And I believe this is a Rule 72 motion to be
[6] governed by the earlier clearly erroneous standard or contrary
[7] to law standard, whether or not at this level a discovery
[8] motion can be overturned.
[9] **THE COURT:** His memo endorsement says that he felt --
[10] and I had it out a second ago, let me pull it out -- Judge
[11] Kara's prior ruling on this issue precludes the arguments now
[12] raised by plaintiff's counsel.
[13] So it is sort of a, what he said in another case,
[14] which Judge Francis almost seems to be saying was law of the
[15] case for all of these cases.
[16] So why is that something that should be deferred to
[17] when, in effect, he is citing my ruling in another case?
[18] It is like saying I should refer to my own ruling in a
[19] different case.
[20] **MR. DOUGHERTY:** I would say it is just as proper for
[21] any Magistrate Judge to reply on a Southern District judge in a
[22] related action or a nonconsolidated.
[23] **THE COURT:** But not necessarily to have preclusive
[24] effect, right?
[25] **MR. DOUGHERTY:** Yes.

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[1] **THE COURT:** Do you think that the MacNamara ruling has
[2] a preclusive effect in this case?

[3] **MR. DOUGHERTY:** I think that ruling was likely here
[4] considered by Magistrate Francis and was part of what is
[5] probably a conglomerate of facts that, of law, that he used to
[6] make the decision in the MacNamara case.

[7] **THE COURT:** Thank you.

[8] Mr. Meyerson.

[9] **MR. MEYERSON:** Your Honor, I do apologize for any
[10] righteousness that --

[11] **THE COURT:** -- don't apologize for righteousness.

[12] **MR. MEYERSON:** Actually, I believe it came out, I
[13] think there was a, I am saying righteous indignation on my
[14] part. My client, Ms. Hershey-Wilson is 21 years old, and I
[15] kept thinking of my 21-year-old daughter who happens to be an
[16] activist.

[17] **THE COURT:** I believe that was worth saying. I was
[18] only tweaking you.

[19] You are right, what goes around comes around.

[20] To the extent that the defendant takes what you think
[21] is a cavalier attitude toward your client's privilege, my only
[22] point is, at least Judge Francis and I agreed with you to their
[23] privilege.

[24] **MR. MEYERSON:** I understand.

[25] This is a very narrow issue, your Honor. Although I

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[1] **MR. MEYERSON:** No. And I got him reversed.

[2] **THE COURT:** He is a great jurist. Go ahead.

[3] **MR. MEYERSON:** And that's not due to me. That was
[4] because I was lucky that day in front of the circuit.

[5] But the point I want to make here is, you have taken a
[6] very broad view in MacNamara of what emotional damage claims
[7] mean in reality and in law.

[8] My client, let me give you these facts, and I just,
[9] you have seen them, but my client is 24 years old. At 24 she
[10] is arrested at the RNC.

[11] When she was in high school, she and her family went
[12] to family counseling. She may have gone to independent
[13] counselling. The therapist said, you are depressed, here is
[14] some medication.

[15] She graduates from high school, has no medication or
[16] therapy for four years, gets arrested at the RNC and,
[17] basically, says, I have a natural emotional reaction when I am
[18] in jail for 24 hours. That is my emotional reaction. Has
[19] nothing to do with my mental health condition. I was scared, I
[20] was sad, I was anxious. And I got out 25 hours later. I took
[21] in the fresh air, I sighed. And it largely evaporated, all
[22] though not totally. I went to Dr. Ores before I went back to
[23] Maine. You can have my records from Dr. Orres. I am okay. I
[24] am not seeking to put into this record, in that litigation, my
[25] mental health condition. I am not going to call a

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[1] think it has profound practical and profound legal
[2] implications.

[3] The narrow issue is what triggers the waiver of a
[4] client's mental health record privilege that pre -- the records
[5] coming from a prelitigation-incident therapy.

[6] You, in MacNamara, I think that's a question of law.
[7] And I think that Magistrate Judge Francis, on both a legal and
[8] practical and differential basis, said to himself, look,
[9] whatever I think of Meyerson's arguments, and however I might
[10] have ruled, I am not going to write an opinion because whatever
[11] I think, Judge Karas has sent all of these cases to me and I am
[12] not going to buck Judge Karas because he made a ruling in a
[13] previous case which has indicated his position of law on this
[14] matter. And, therefore, I am precluded from overruling Judge
[15] Karas. He can overrule me, I can't overrule him. Fair enough.

[16] I then file this appeal and say to you, your Honor,
[17] that with due respect, I am critical, and I accept this with
[18] whatever admonition you want to give me, I am critical of your
[19] MacNamara decision.

[20] And it is like I recently said to the Second Circuit
[21] about Judge Koeltl, that I realize that the Second Circuit
[22] recognized his wisdom as a jurist, as I do your wisdom as a
[23] jurist. You are just wrong, I think, on what you did in
[24] MacNamara.

[25] **THE COURT:** No offense to Judge Koeltl.

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[1] psychiatrist, I am not going to say I have a permanent
[2] condition, a clinical or nonclinical condition.

[3] **THE COURT:** Paragraph 71, quote, the plaintiff
[4] denies -- of the incident herein described --

[5] **MR. MEYERSON:** -- I accept that as my failure in
[6] developing the case. We say that's not the case. In point of
[7] fact, the facts are the facts. She never has sought treatment.

[8] **THE COURT:** The fact that she hasn't sought treatment,
[9] that wouldn't be a cause to bounce that claim.

[10] **MR. MEYERSON:** I am standing up here and saying to you
[11] that my client will get on the witness stand at the trial and
[12] say, when I say, what emotional injury did you suffer -- well,
[13] let me withdraw that.

[14] Assuming my client just got on the witness stand and
[15] said, I was in jail for 25 hours, and I didn't ask her another
[16] question about any emotional reaction injury, and then I said
[17] to a jury, she was in custody 25 hours, you should award her a
[18] sum of money for the loss of her liberty, either for 25 hours
[19] taken, anxiety and sadness she felt, objection, your Honor,
[20] there is no evidence in the record.

[21] Okay, so I want to ask her, what was your emotional
[22] reaction injury?

[23] And she will say, I was sad, I was unhappy, I was
[24] scared.

[25] And when did that end?

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[1] It ended largely when I got out of jail. But I went
[2] to somebody who said the records will show probably you will be
[3] all right. Just go home.

[4] **THE COURT:** Let me just stop you right there.

[5] Even if she is claiming residual emotional injuries,
[6] such that she went to, after the fact, see a therapist of some
[7] kind, and even at the end of the day if, as a result of seeing
[8] the therapist things get better in her life, again we are not
[9] here at trial deciding what they get to put in. The question
[10] is whether or not anything about her psychological history, her
[11] mental health history -- she was 65 and had high school visits
[12] to a therapist, is that different?

[13] That's why you have to be careful with my ruling in
[14] MacNamara. Once that door is even cracked open a little bit,
[15] how can it be that the defendants don't get to have access to
[16] her psychological history to rebut either the claim for the
[17] injuries at all or the extent of the damages she should get as
[18] a result of the alleged injury?

[19] **MR. MEYERSON:** If --

[20] **THE COURT:** By the way, that's the majority view of
[21] the courts in this district.

[22] **MR. MEYERSON:** Actually not the majority view of
[23] courts throughout the country, it is the view of courts
[24] throughout this district, which comes out of Judge Buchwald's
[25] decision when she was a magistrate. Rather, it is a more

[1] psychiatrist to look at her, the law in this district, if they
[2] would argue that, is, you can't do that because this is really
[3] a garden-variety thing.

[4] And if that's the case, what is the value of the
[5] records except to fish into the most highly sensitive material
[6] that -- my client doesn't even know what's in there, that no
[7] magistrate should look at. That I don't want to look at.

[8] And my position is, therefore, that if she couldn't be
[9] subjected to an examination by a psychiatrist to disprove
[10] something that we are not even attempting to prove, then there
[11] is no basis for the records.

[12] And if you want to make a thing out of, did she have
[13] psychiatric treatment five years ago in high school?

[14] She has admitted that.

[15] She has also admitted that she had medication for
[16] depression and family counseling.

[17] I don't know what the litigation value would be of
[18] bringing that out in front of a jury, because a jury would be
[19] offended by that.

[20] But if the city wanted to do that, and you let --

[21] **THE COURT:** -- that's a different question. We are at
[22] discovery.

[23] **MR. MEYERSON:** That's correct. So what is the value
[24] of the records? We must again get to the point, Judge, of
[25] these records are ordinarily privileged.

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[1] complex claim in which the views of psychiatrists figured
[2] prominently in prelitigation events.

[3] That is that there was a connection obviously made in
[4] Sidor between the prelitigation therapy that that client had,
[5] leading Magistrate Buchwald to conclude that there -- that
[6] access to those records were relevant. There has to be some
[7] degree of time and material relevance.

[8] And your prior ruling simply --

[9] **THE COURT:** -- forget the prior ruling. Let's talk
[10] about this case.

[11] **MR. MEYERSON:** But the problem is, Magistrate Judge
[12] Francis seems to have implied that whatever the merits of your
[13] arguments, Meyerson, that I might agree with, I can't touch it
[14] because I am reading Judge Karas's ruling --

[15] **THE COURT:** -- argue it as if the standard review was
[16] de novo.

[17] **MR. MEYERSON:** Okay. Here is my response to you.

[18] At the same time the law in this district, as you
[19] interpret it, seems to suggest that access to those records are
[20] permissible because she, by merely saying I had emotional
[21] reaction for the time of the event, triggers the waiver.

[22] The law in this district also seems to suggest, by
[23] Judge Carter and Judge Sotomayor, when she was a District
[24] Judge, is that when the city then says, and I will get to the
[25] logic of it, we want to take her examination, we want a

[1] What triggers the waiver of the privilege, that is the
[2] narrowest -- that's the very narrow issue of law. And if you
[3] say that what triggers it is simply the fact that a client that
[4] is put into jail for 25 hours and would testify, forget what I
[5] put in my complaint, if you can, for the moment, would simply
[6] testify, look, when I was in jail I was upset.

[7] **THE COURT:** And give me money for that, right?

[8] **MR. MEYERSON:** Well --

[9] **THE COURT:** -- and give me money.

[10] **MR. MEYERSON:** That is correct.

[11] **THE COURT:** And how is it that the defendants are to
[12] prepare their defense, to rebut any claim you might make as to
[13] why she should get any money or why she should get a certain
[14] amount --

[15] **MR. MEYERSON:** -- Judge, it seems to me that you are
[16] seemingly bootstrapping yourself into almost -- almost into a
[17] nonsensical position.

[18] **THE COURT:** I am surprised to hear you say that.
[19] Because every case I have read, and I have read a bunch, in
[20] addition to the ones you cited me to, to the extent that courts
[21] have said that the privilege is waived even into the so-called
[22] garden variety claims, not a term of art as far as I can tell,
[23] but that's the one that everyone seems to be using, but the
[24] reason it is relevant, so that the defendants can attack the
[25] causation between the offending event and the so-called mental

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[1] distress. And also the claim for damages.

[2] I am not making this up.

[3] **MR. MEYERSON:** I understand that. And then I say to
[4] you, what do you expect to find in mental health records of a
[5] high school kid?

[6] Perhaps the high school kid might have said, gee, you
[7] know, I am depressed. And in five years if I get arrested,
[8] what will happen to me, doc? Will I be -- what conceivable
[9] relevance beyond the fact, if it is relevant at all, that she
[10] has had therapy, had medication, and that ceased to exist four
[11] years ago? If that's relevant, fine.

[12] **THE COURT:** Because when somebody claims to have
[13] suffered some sort of emotional damage, distress, anxiety,
[14] depression, their prior history, that might relate to this --
[15] we are going in circles.

[16] **MR. MEYERSON:** Can I give you another example?

[17] **THE COURT:** Let me give you another example.
[18] Let's take it out of mental health, put it in physical
[19] health.

[20] Somebody goes to a hospital and they decide to
[21] involuntarily commit the person. And in the middle of him
[22] struggling he yells out, ouch, my knee. And he doesn't put in
[23] any expert testimony that he actually ripped his meniscus,
[24] medial meniscus, or anything like that. He says, I want money
[25] for pain and suffering because my leg got hurt that day. And

[1] It is not limited to that.

[2] **MR. MEYERSON:** But --

[3] **THE COURT:** -- what you are trying to do --

[4] **MR. MEYERSON:** -- I am now limiting it.

[5] **THE COURT:** Mr. Meyerson, there is a complaint that
[6] you filed. You have brought actions against defendants. And
[7] you are seeking damages for emotional distress and anxiety.
[8] And you are trying to, at the same time, asking potentially for
[9] damages on those emotional harms. You are trying to put a wall
[10] on someone's emotional slash mental history and what they
[11] suffered on that day.

[12] **MR. MEYERSON:** I am not --

[13] **THE COURT:** -- Mr. Meyerson, interrupting is not
[14] helpful to anybody. I never put time limits on you. Don't do
[15] that.

[16] **MR. MEYERSON:** I'm sorry.

[17] **THE COURT:** But that strikes me as antithetical to
[18] common sense. And many courts around the country have said,
[19] you cannot pretend that a person's mental past has nothing to
[20] do, is completely irrelevant, and all the standards that we
[21] use -- and there is no conceivable relevance to the emotional
[22] slash mental harm that somebody suffered on that day.

[23] And you cannot ask the defendants to defend themselves
[24] on causation and on the extent of the damages without getting
[25] access to that information.

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[1] it turns out that 20 years prior to that he saw an orthopedic
[2] surgeon.

[3] **MR. MEYERSON:** For a knee injury?

[4] **THE COURT:** Yes.

[5] **MR. MEYERSON:** He is entitled probably -- they are
[6] probably entitled to get those records.

[7] Here is where we are having our debate. And it is a
[8] fascinating debate, I tried to make it in my submission.

[9] You are equating an emotional reaction to being in
[10] jail for 24 hours, which is attended to the loss of the liberty
[11] itself. It's almost intrinsic in it.

[12] I mean, I did have a client, a Quaker, an older man
[13] who, when he was asked at a deposition by the City of New York
[14] what his reaction was to being in jail for 24 hours, as the
[15] good Quaker he was, he said, actually, it was an enlightening
[16] experience. And he actually wrote to the Quaker paper.

[17] Again, it brings up a lot with my daughter, she went
[18] to a Quaker school.

[19] But he wrote to the Quaker paper. And I said to
[20] myself, you just indicated you didn't have any damages for
[21] being in there.

[22] The point being, most people, in being confined for 24
[23] hours involuntarily in a not-pleasant situation, might say, I
[24] was sad, I was upset, I was scared. And then I say --

[25] **THE COURT:** -- that's not how the complaint is worded.

[1] Now, that is not to say that there cannot be limits.

[2] That is not to say that every record gets turned over. That is
[3] not to say that there are temporal decisions here.

[4] You have a 24-year-old client, not a 74-year-old
[5] client. So her high school records -- I wouldn't say, if I was
[6] Judge Pitman, to a five-year limitation. But the reason for
[7] the limitation is that it recognizes that within that time
[8] period it is not -- say there is no reasonable relevance of the
[9] records -- go ahead.

[10] **MR. MEYERSON:** There are two things you mentioned in
[11] there. One is the complaint and one is the moreover arching
[12] philosophical debate we are having --

[13] **THE COURT:** -- I don't do philosophy, Mr. Meyerson. I
[14] am doing law.

[15] **MR. MEYERSON:** Philosophical legal debate that we are
[16] having, which is not inconsequential.

[17] The first thing about the complaint is to the extent
[18] that I drafted a complaint that defined, that says what it
[19] says.

[20] Of course, an attorney and a party can come in and
[21] say, I withdraw the lawsuit, I withdraw this claim. I narrow
[22] this to the extent of a claim.

[23] And to the extent that I have failed my client in the
[24] manner of the drafting of the complaint, in the amended
[25] complaint, to make it an -- that there is this all encompassing

[1] emotional trauma that flows from this event, I stand indicted.
[2] But I withdraw that. And my client has narrowed the claim.
[3] And the claim is simply that while I was incarcerated, and for
[4] a day or two thereafter, I had the ordinary natural reaction.
[5] Which I assume --

[6] **THE COURT:** -- she says is ordinary and natural. But
[7] how is it that a jury is to evaluate what she says is ordinary
[8] unless they know something potentially about her emotional
[9] past?

[10] You know, New York law recognizes the thin skull
[11] doctrine for psychological harms not recognized by the Second
[12] Circuit. But there are plenty of cases within New York State
[13] that recognize it.

[14] It is interesting because that could easily inure to
[15] the plaintiff in these kinds of cases.

[16] I don't want to get into philosophy.

[17] **MR. MEYERSON:** This is a legal argument, your Honor.

[18] What I import from your comment, that I listened to
[19] very carefully, and I apologize for interrupting, although I
[20] did hear what you are saying, is, how do you know what is, and
[21] I understand what you are saying, inquiring, how do I know that
[22] that's natural?

[23] The natural flow of that inquiry leads to them getting
[24] records, because, you will say, get these records; and them
[25] saying, oh, but irrespective of the records, she shouldn't have

[1] **THE COURT:** Because she is only six years removed from
[2] high school. If she were 74 years old and it was high school
[3] records, you might have a point. Which is why many courts have
[4] accepted, in part, your argument.

[5] But they tailor it to the facts before them. And
[6] that's what I am trying to do, and say, that whether or not
[7] MacNamara was the right decision or not, I am focused on this
[8] case.

[9] **MR. MEYERSON:** Okay. Well, I would ask you, then, to
[10] defer back to Magistrate Judge Francis, and let me make the
[11] arguments to Magistrate Judge Francis on the assumption, as I
[12] read his decision, that he did not even waive the arguments,
[13] simply said, I am precluded.

[14] And it is understandable why he did that.

[15] My last point and I will sit down, and it is, by
[16] comparison, not a knee injury, but more directly in point.

[17] In an antiwar demonstration case that I have with the
[18] city, a client was in custody seven or eight hours. She was an
[19] NYU student. A freshman then.

[20] She'd had counseling when she went to NYU. She said
[21] that during the seven or eight hours she was on and off crying,
[22] the next day she was upset. And that's the extent of her
[23] emotional injury associated with what she believed was a false
[24] arrest and loss of her liberty.

[25] The city didn't ask for the mental health records in

[1] had this reaction. Or maybe because of the fact that she
[2] concedes she had depression, that's why she had the reaction.
[3] Your Honor, we need to have her go to our psychiatrist for
[4] several hours.

[5] And Mr. Meyerson now needs to put on a psychiatrist so
[6] that the jury can be -- so it can be explained to a jury that
[7] intrinsic in being restrained of your liberty for 24 hours in a
[8] jail, is a natural reaction of, whatever it might be, might
[9] even be giddiness, but in this case it was sadness.

[10] I just think, your Honor -- by the way, I believe the
[11] law in this district is that they wouldn't be able to get that
[12] mental health --

[13] **THE COURT:** -- why are we having a discussion about
[14] something that is not on the table right now? Because the
[15] cases do recognize the distinction between a defendant's
[16] interest in getting past mental health history of a plaintiff,
[17] either an employment discrimination case, a civil rights case,
[18] and a rule --

[19] **MR. MEYERSON:** -- at least --

[20] **THE COURT:** -- according to the cases that I read,
[21] let's --

[22] **MR. MEYERSON:** -- but I think they are inner related,
[23] because if, in fact, you can't get the examination, what does
[24] the value of a record that says she was depressed in high
[25] school have to do with her saying, I was afraid --

[1] that case. That's neither here nor there, that's that
[2] litigation. But the import of your decision is, that if my
[3] client had come in and said, look, I had no emotional damages
[4] other than the fact that when I was in custody I cried on and
[5] off, the next day I related to my family what happened, and I
[6] was upset. And that was it. That they then -- that triggers a
[7] waiver to open everything and anything.

[8] And if you are fortunate to be a young kid, an
[9] 18-year-old freshman at NYU, or a 24-year old -- if you are
[10] unfortunate enough, maybe, to be 24 and had gone to a shrink
[11] when your family sent you to a shrink, when you were in high
[12] school, the unfortunate situation, under Judge Karas's ruling,
[13] is that if you were 74 you wouldn't have to give up those
[14] records, but at 24 you do. It doesn't make any sense. And
[15] maybe the law --

[16] **THE COURT:** What you are saying is it is never
[17] relevant. What I am saying, it depends on the case.

[18] Do you think the blanket rule is never relevant and
[19] they take the --

[20] **MR. MEYERSON:** -- there are Courts that have taken
[21] that position. Your Honor, please, with due respect, I respect
[22] your broad ruling, it is a very broad ruling, but --

[23] **THE COURT:** I haven't ruled yet.

[24] **MR. MEYERSON:** Well, in MacNamara, there it's a broad
[25] ruling.

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[1] **THE COURT:** It is not a broad ruling. It's actually
[2] not a broad ruling. But doesn't matter, we are not here to
[3] reopen MacNamara.

[4] **MR. MEYERSON:** There are cases that reject your
[5] position, that say --

[6] **THE COURT::** -- it wouldn't be the first time. Or the
[7] last.

[8] **MR. MEYERSON:** That say that the emotional reaction
[9] condition that I am describing here doesn't put in to play her
[10] mental health condition, which is a different thing, as a
[11] matter of law, that is what I am arguing.

[12] **THE COURT:** Okay. Thank you, Mr. Meyerson.

[13] **MR. DOUGHERTY:** Well, your Honor, what, at first what
[14] I think we need to do is pull back and realize that we are in a
[15] court of law. And subsequently we are governed by rules of
[16] procedure.

[17] And here the rule that we are governed by is the
[18] standard under Rule 72.

[19] And under that standard, and under the case law
[20] governing that standard, Mr. Meyerson has failed to show that
[21] Judge Francis's ruling was either clearly erroneous or contrary
[22] to law.

[23] And just briefly on the clearly erroneous point.
[24] Under Lindenal versus Citco Refining, the reviewing Court has
[25] to be left with the definite and confirm conviction that a

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[1] mistake has been committed.

[2] Additionally, Mr. Meyerson has failed to establish
[3] that Judge Francis failed to apply relevant case law or
[4] statutes, that that is the standard of review that this Court
[5] should be governed by making its determination on this motion.

[6] And just to get into the merits, the reason that
[7] Ms. Hershey-Wilson's psychological history is relevant and
[8] discoverable, is because she put it at issue by claiming and
[9] seeking emotional distress damages.

[10] We are governed by the complaint which suggests that
[11] there are residual effects that she suffered as a result of her
[12] arrest, which was a sworn statement as well as interrogatory
[13] responses, indicate that in interrogatory 5 she suffered
[14] emotional distress, mental anguish, fear, psychological trauma.

[15] Because of that, it is clear -- and she is seeking
[16] damages, money damages, which would ultimately come from the
[17] taxpayers of New York for those damages which the city must be
[18] allowed an opportunity to examine intervening causation of her
[19] emotional distress, and obtain a picture of her psychological
[20] history.

[21] And one of the things that is also relevant, I would
[22] like to point out, is that the records we are seeking are
[23] contemporaneously relevant to her arrest. She was 24 at the
[24] time. The records reach back maybe four or five years. And
[25] under Judge Pitman's ruling in McKenna, he allowed in

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[1] psychological history that reached back five years, which is
[2] the same time frame that we are working with here.

[3] **MR. MIRRO:** Judge, if I may, just to add one or two
[4] brief points.

[5] **THE COURT:** Yes.

[6] **MR. MIRRO:** First, I want to thank you, Judge, for
[7] your patience today.

[8] A couple of points I wanted to mention, Judge. First,
[9] you asked earlier about the standard of review and Judge
[10] Francis's order.

[11] I would like to emphasize, Judge, Judge Francis had
[12] before him all of the factual materials and all of the factual
[13] arguments that we are making today.

[14] In addition, Judge Francis had before him the legal
[15] authorities that we submitted to your Honor. So Judge
[16] Francis's decision and Judge Francis's order, were based on
[17] both the facts and on the law.

[18] And in that situation, I would submit to you, Judge,
[19] that the standard here is, as Mr. Dougherty has said, is the
[20] clearly reasonable standard.

[21] This is not a case where the Judge Francis has made up
[22] purely a determination based on purely legal principles that
[23] might be a de novo, might be subject to de novo review by this
[24] Court. This decision was based on both facts and the law. And
[25] citation.

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[1] Maybe there is language in that order that suggests,
[2] loose language in the order, that suggests otherwise. But
[3] that's what was in front of him. And we would submit that
[4] Judge Francis couldn't have made a determination that your
[5] Honor's decision in MacNamara was pervasive unless he
[6] considered the factual underpinnings.

[7] The only other point, Judge, that I wanted to make at
[8] this point, the question of relevance has come up.

[9] Your Honor clearly understands what the issue is here.
[10] And the issue is, and as Mr. Dougherty said, the issue is one
[11] of causation.

[12] Mr. Meyerson's client is suing us for money due to
[13] emotional, claimed emotional distress, that results in waiver.
[14] And the reason that the emotional history, the psychological
[15] history are relevant, because we are entitled, as the Court has
[16] alluded to several times today, to examine this plaintiff on
[17] what alternative causes of emotional distress she may have been
[18] suffering at the time of her arrest and after her arrest.

[19] Your Honor, the principle here is that defendants are
[20] not obligated to take plaintiff's word for it, that her
[21] emotional distress was caused solely by the arrest and
[22] confinement.

[23] We understand that counsel -- plaintiff's counsel made
[24] a very fine argument, and we understand that he is advocating
[25] on behalf of his client. But we are not obligated, and it is

[1] contrary to the discovery rules to suggest that we are
[2] obligated, to take plaintiff's word for it on the causation
[3] question with respect to her emotional distress. And it goes
[4] to damages as well.

[5] I think that is the sum and substance of it, Judge.
[6] And, obviously, there is just a wealth of authority supporting
[7] both the MacNamara decision and the ruling that we are seeking
[8] here.

[9] I mean, and let's look at it, just one other point,
[10] one other point. Mr. Meyerson has not put in, really, any
[11] legal authority of substance. He got a wealth of authority
[12] from outside the district that obviously doesn't bind the
[13] Court. But he hasn't explained why this case is any different
[14] from all the decisions that do bind this Court, including
[15] Second Circuit opinions.

[16] And I think I will leave it at that.

[17] **THE COURT:** Sure. Mr. Meyerson, you get the last
[18] word.

[19] **MR. MEYERSON:** One, Mr. Dougherty talked about
[20] intervening causation. This is a preexisting causation, and I
[21] would agree with him, that if we were dealing with an
[22] intervening causation, that is that there had been the arrest,
[23] she said this, and then afterwards some other incident
[24] occurred, then it becomes -- and she sought treatment for that,
[25] we then have that intervening causation.

[1] **THE COURT::** I don't know that Rule 72 applies here,
[2] but I know, for it doesn't make sense to send it back to Judge
[3] Francis because then the losers are going to come back to me
[4] anyway. So whether or not it is de novo review or discretion,
[5] I would assume it is de novo review. Not that I think Judge
[6] Francis did anything wrong.

[7] Rule 26 provision for liberal discovery, anything that
[8] is relevant to, conservatively relevant to the case that can
[9] lead to admissible evidence, the parties are entitled to Rule
[10] 26. And the law recognizes privileges.

[11] But the law also disfavors privilege because they
[12] destruct the ascertainment of the truth. And, therefore, the
[13] law recognizes that in certain situations, when a plaintiff
[14] makes certain claims related to medical damages or mental
[15] health damages, then the plaintiff can be deemed to have waived
[16] the applicable privileges.

[17] Now, let me say, just so it is crystal clear for the
[18] record, I don't feel bound by what I ruled in MacNamara,
[19] because these are evidentiary rulings. These are discovery
[20] rulings. These are not matters of first impression where the
[21] principle is unaffected by the facts of the particular case.

[22] So it is true that the city put forth legal arguments
[23] in addition to my ruling in MacNamara. And whether Judge
[24] Francis felt he was bound by that ruling or he was persuaded by
[25] it, is of no import to this case. MacNamara is MacNamara, this

[1] Number 2, with all due respect to the city, in
[2] substance, they are ruled -- that Judge Francis was ruled by
[3] MacNamara, whether or not you were limiting it to -- he was
[4] precluding it to where he could go or not go on this matter.

[5] Finally, to the extent that the city wants to put into
[6] play the fact that she had a preexisting condition for which
[7] she sought treatment, they have the facts. I did not direct
[8] her not to answer, or -- she hasn't been deposed yet, but they
[9] know that she has, and she would answer, she had -- I guess it
[10] came out of her 58-H hearing. She did say, I had treatment, it
[11] was for depression, in family counseling.

[12] To the extent that they want to bring to the jury that
[13] there were other matters that implicated her actions, and the
[14] information in the records isn't going to elucidate anything.

[15] Thank you, your Honor. I apologize and I appreciate
[16] your indulgence.

[17] **MR. DOUGHERTY:** On the issue of causation, actually,
[18] one of the cases cited by Mr. Meyerson, Bridge v. Eastman
[19] Kodak, there was language in that case, on page 223, saying
[20] that, moreover, since plaintiff seeks to prove they suffered
[21] emotional distress, defense counsel has the right to inquire
[22] into plaintiff's past for showing, at least in part, that they
[23] were not job related.

[24] That case dealt with Title VII sexual harassment.
[25] But it should be considered in this case as well.

[1] case is this case.

[2] Now, in terms of this case, we have a 24-year-old
[3] plaintiff who has claimed, both in her complaint and in her
[4] interrogatory responses, which presumably she can't blame Mr.
[5] Meyerson for, that she suffered emotional distress,
[6] psychological trauma, fear, humiliation, embarrassment and
[7] anxiety.

[8] She went to see a doctor. And in the complaint she
[9] alleges that she continues to suffer residual emotional
[10] damages.

[11] Now, Mr. Meyerson may want to selectively withdraw
[12] that one sentence from the complaint. But her interrogatory
[13] answers are it. That is it. That is what she is claiming.

[14] And she would then ask a jury to award her damages,
[15] presumably not an insignificant amount of damages, based on
[16] those injuries.

[17] Now, some might call those garden variety. Some have
[18] described precisely those kind of damages being more than
[19] garden variety.

[20] I haven't read a case that gives the precise
[21] definition of what garden variety is.

[22] It has been my experience that garden variety is part
[23] in the eye of the beholder, but even assuming it is a garden
[24] variety claim, I am persuaded by the cases, not just in this
[25] district, but around the country, that have found that

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[1] precisely such claims waive the privilege to some extent.
 [2] Because I do think, to the extent that somebody is claiming,
 [3] for example, psychological trauma, even if she doesn't intend
 [4] to substantiate the claim, or to quantify her damages through
 [5] the use of an expert, just based on her own testimony of what
 [6] she felt, what she felt she was harmed by, what emotional pain
 [7] and suffering she claims to have been inflicted upon her, opens
 [8] the door to the possibility that the defendant should be
 [9] allowed to explore either alternate causes for such
 [10] psychological trauma and other mental health damages, and also
 [11] to rebut the claim for the amount of damages that the plaintiff
 [12] might seek from a jury.

[13] And the cases that discuss this, discuss it in a wide
 [14] variety of contexts, employment discrimination, and civil
 [15] rights, and specifically describe them as garden variety cases,
 [16] and specifically note that the plaintiff is not claiming to
 [17] rely on an expert to substantiate the claim for mental health
 [18] damages.

[19] But the fact that plaintiff isn't saying,
 [20] notwithstanding what is in her complaint, that she continues to
 [21] suffer from these things, that may just go to the amount of
 [22] damages she gets, it doesn't change the fact that she is
 [23] alleging that the wrong done to her allegedly by the
 [24] defendants, caused her mental health harms.

[25] And it cannot be redressed as emotional distress, and

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[1] somehow pretend it is in in another category where there is no
 [2] relevance between somebody's mental health history and the
 [3] emotional distress that somebody claims to have suffered.

[4] And that is what the cases talk about. I am not going
 [5] to list them all. Some of the ones are the ones listed in the
 [6] city's papers. But I have read cases, there is a recent case
 [7] from the Eastern District of Michigan that goes through the law
 [8] on this.

[9] For the record, of course, I reviewed the McKenna
 [10] case. I reviewed the Sidor case, which Judge Buchwald does
 [11] say, even if it is garden variety, that it does open the door.

[12] There is a case called Williams versus NPC
 [13] International from the Northern District of Mississippi. There
 [14] is a case called Victoria versus Larkinder from the Eastern
 [15] District of Louisiana, Synbios. S-Y-N-B-I-O-S. Another
 [16] Colorado case called Fox versus The Gates Corporation.
 [17] District of Connecticut case called Gattegno, G-A-T-T-E-G-N-O,
 [18] versus Price Waterhouse Coopers LLP.

[19] And, by the way, so everybody's clear, none of this
 [20] means that if the defendant wants to do a Rule 35 examination,
 [21] that this ruling is a per se basis for them to get that. We
 [22] will have that fight if and when the defendant makes that
 [23] application.

[24] Now, I do think that, as Judge Pitman recognized, and
 [25] I think he is right, that this doesn't mean that the privilege

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[1] is waived in its entirety. It depends on the case. It depends
 [2] on the claim, it depends on the extent of the mental health
 [3] history that, in part, may depend on, for example, the length
 [4] of time between when somebody may have sought psychiatric
 [5] health or suffered from some sought of emotional disease. Even
 [6] and when the alleged injury took place.

[7] Here, even a five-year limitation, so the defendant
 [8] would not be allowed to go back further than five years into
 [9] plaintiff's mental health history, wouldn't change anything
 [10] because, as I understand it, a lot of the data is within the
 [11] five years. But I am not saying that five-year rule makes
 [12] sense here. I am saying that a 24-year old isn't getting any
 [13] comfort.

[14] I think what happened to her in high school and
 [15] college is relevant to what she is claiming in this case.

[16] And, Mr. Meyerson, I don't take lightly at all your
 [17] philosophical point. I understand this may put people like
 [18] your client in a potential dilemma, but that is what the law
 [19] does to your client's position. It is not just your client, it
 [20] is people alleging all kinds of mental health allegations. It
 [21] involves things in people's medical history that they don't
 [22] want revealed. But the law says they have to make a choice.
 [23] If they want to recover money for these types of injuries, then
 [24] they have to be prepared under these circumstances to
 [25] recognize, to properly allow the defendants to rebut the claim,

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[1] either in terms of causation or in damages, that they are going
 [2] to get peeked into that person's mental history, as in this
 [3] case.

[4] So I am affirming Judge Francis's ruling, even on the
 [5] de novo standard.

[6] **MR. MEYERSON:** Could I have the records before they
 [7] are sent to the city reviewed by Magistrate Judge Francis?

[8] **THE COURT:** Yes, thank you for reminding me of that.
 [9] It is something I did in MacNamara.

[10] If it is something, even in the context of
 [11] psychological records that would appear to be super sensitive,
 [12] for example, if there is something that comes up in an
 [13] evaluation by a doctor, that came up in a conversation with a
 [14] doctor, but really isn't relevant to the damages claimed here,
 [15] I don't want to give an example because I wouldn't want to
 [16] impugn your client, I wouldn't see a problem if you want to
 [17] have Judge Francis review them in camera first.

[18] I do think you should be judicious in using that tool.

[19] **MR. MEYERSON:** Do I understand -- my understanding is
 [20] that my client went to high school and lived in Portland. So I
 [21] don't even -- I get to her name of her family counselor,
 [22] psychiatrist, co-therapist, whoever it was. I will get an
 [23] authorization from my client and I will send for the records
 [24] and ask them to be delivered to Magistrate Judge Francis, I
 [25] guess.

[1] **THE COURT:** But that is precisely what I was
[2] suggesting I don't think you should do. Because what you are
[3] saying is that -- all of these records are so sensitive they
[4] should be reviewed in camera.

[5] **MR. MEYERSON:** I don't know. I don't even think --

[6] **THE COURT:** -- I know that you can take an appeal if
[7] you want.

[8] **MR. MEYERSON:** Well, then, I will get the records
[9] under your order, I will review them understanding your order
[10] is that I shouldn't just be knee jerk about it and make a
[11] judgment as to whether I think there is something in there that
[12] is of super sensitivity. For example, the topic of an
[13] incestuous thing, I am not suggesting that that is in there.

[14] **THE COURT:** What if, in the course of talking to a
[15] psychiatrist, somebody admits to committing a crime, a
[16] misdemeanor, that may have no relevance to this case
[17] whatsoever, could be highly prejudicial. It is a case that has
[18] been through a deferred prosecution or some sort of alternative
[19] resolution and wiped from the records. That might not go to
[20] her credibility. But I can see an argument being made. And
[21] what my ruling allows for is for you to exercise your judgment
[22] and seek refuge from Judge Francis.

[23] **MR. MEYERSON:** Secondly, and this is again an inquiry,
[24] assuming that my client decides that she doesn't want to pursue
[25] whatsoever emotional damage claims, and that the only claim she

[1] is an issue that, of course, came up in the MacNamara case.
[2] And we have that transcript. And there you described the type
[3] of records of being extraordinarily sensitive. I think the
[4] parties would benefit, Judge, from some clarification on what
[5] you mean.

[6] Here is my concern, Judge. We have a motion pending
[7] right now before Judge Francis, where one of the plaintiff's
[8] counsel is asking for Judge Francis to do a line-by-line review
[9] of psychological records, and to adopt certain redactions and
[10] so on. So the issue is going to be, the issue is very ripe
[11] before Judge Francis, I think it would be helpful if you could
[12] give some guidelines as to what you think --

[13] **THE COURT:** I think I just did by way of example. I
[14] can't do any better than what I have done.

[15] Again, you have to, from my standpoint, these have to
[16] be culled down the middle. The ruling that Mr. Meyerson got in
[17] his favor as to your client's work history, and the privileges
[18] and whatnot, if you had wanted to go to Judge Francis with
[19] something super or extremely sensitive, then you can make that
[20] application.

[21] But it is more a, you-will-know-it-when-you-see-it
[22] kind of thing. I can't give more direction. And, frankly, I
[23] would be more reluctant to because my involvement in discovery
[24] in this case is very different than Judge Francis's. He is in
[25] the weeds.

[1] will make is for the loss of her liberty and the violation of
[2] her rights, the damage claim, and I withdraw that claim
[3] formally and in every which way. I take it then the records
[4] become irrelevant?

[5] **THE COURT:** You are asking for an advisory opinion?

[6] **MR. MEYERSON:** No, I am asking, because there are
[7] three options, and the third option is to withdraw the lawsuit.

[8] I don't know what my client's answer is going to be.
[9] I never asked my client. But I wanted to make the arguments
[10] without me being affected that my client may elect to withdraw
[11] the case, because I think that it is punitive. I understand
[12] your ruling and you are not punitive.

[13] **THE COURT:** I -- you can do the research. If all she
[14] is going to claim is mere loss of liberty, you know, I haven't
[15] seen any cases that say one thing or another on it. But you
[16] can decide what you want to do. I hope she doesn't withdraw
[17] the whole case.

[18] **MR. MEYERSON:** I understand that. You are not going
[19] to rule on that. But on the issue --

[20] **THE COURT:** I couldn't possibly. I haven't thought
[21] about it, it's an advisory opinion, I understand why you asked
[22] for it. But I can't answer the question, Mr. Meyerson.

[23] **MR. MEYERSON:** Okay.

[24] **MR. MIRRO:** You raised an issue about in-camera review
[25] by Judge Francis of certain super sensitive records. And that

[1] So for me to tell him, an excellent jurist, to use Mr.
[2] Meyerson's laudatory phrasing, somebody who is steeped in the
[3] facts of these cases, to tell him how to evaluate these things,
[4] would be folly.

[5] Look, I am going to assume, with good reason, the good
[6] faith of Mr. Meyerson. And, of course, going to assume that
[7] Judge Francis will give this an expedited and serious and
[8] thorough review. And to the extent people have a disagreement
[9] with how he's handled it, I am here six days a week

[10] **MR. MIRRO:** One other question. We have had
[11] opportunity to review the MacNamara transcript where you talk
[12] about the in-camera procedure. One of the things you said, I
[13] just want to know if you are still on board with this, that the
[14] in-camera procedure should only be employed where something is
[15] super or extraordinarily sensitive, and where, you said,
[16] irrelevant to the case.

[17] **THE COURT:** But that is the balancing. From Mr.
[18] Meyerson's standpoint, the example I gave about, in the course
[19] of meeting with a therapist, something got said that has
[20] nothing to do with the therapy, just comes up with the
[21] conversation. I am taking an extreme example. It arguably
[22] will not be -- it is not discoverable, or even if it is
[23] remotely relevant, and maybe there is some other reason to
[24] preclude it being turned over, what if, in the context of
[25] talking about her psychological past, she brings up a medical

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[1] issue that has got nothing to do with this case, deeply
[2] personal medical issue, that has got nothing to do with this
[3] case, then Judge Francis could decide that the records will get
[4] turned over in redacted form. I can't give any more direction
[5] than that.

[6] **MR. MIRRO:** My only concern is that if a patient is
[7] going to a psychotherapist or counselor or psychologist to deal
[8] with her emotional distress, presumably serious emotional
[9] distress, arising from something, whatever that something is,
[10] then my question becomes, gee, is that still an issue in this
[11] plaintiff's life, was it an issue at the time of her arrest.

[12] **THE COURT:** When you get something that is redacted
[13] and you want to challenge it, you call me up and I will see
[14] you.

[15] **MR. MEYERSON:** I take it that any records that are
[16] eventually turned over to the city will be turned over under
[17] protection?

[18] **THE COURT:** Yes. Thank you, Mr. Meyerson.

[19] **MR. MEYERSON:** And finally, I am not sure what I am
[20] going to do, and with all due respect to you, because I raised
[21] it in my submission, I am asking you to certify the issue, it
[22] is a very -- I am professionally and personally concerned about
[23] this issue. After 36 years, there are not too many issues that
[24] pound me, because you have seen it all. But this is kind of an
[25] issue that I think is a very, very important issue.

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[1] **THE COURT:** You don't even have the records handy
[2] right now, so you are going -- it is going to take you some
[3] time to get the records, go over them with your client, and you
[4] can decide what you want to do. And you can let me know.

[5] **MR. MEYERSON:** Thank you, your Honor.

[6] **THE COURT:** I don't think there is any prejudice to
[7] defendants if, since Mr. Meyerson isn't sitting on the records
[8] anyway, I would, even if he were, I would give him some time to
[9] think it over.

[10] I have been told many times by the city that you are
[11] overworked anyway, so you can work on other motions that are
[12] coming your way.

[13] **MR. DOUGHERTY:** Your Honor, just one, finally. I just
[14] want to be clear that Mr. Meyerson turns over the records to
[15] Judge Francis, and he is not involved in any self-review or
[16] redaction prior to these being closed to the case. Plaintiff
[17] should not be involved in selective determination of relevance
[18] of their psychological records.

[19] **THE COURT:** I think what Mr. Meyerson and I talked
[20] about is that he will turn them over, except to the extent
[21] there is something he would like Judge Francis to review and
[22] perhaps redact. So what you are talking about is Mr. Meyerson
[23] shows the documents to nobody, you or Judge Francis, that is
[24] not at all what we talked about.

[25] **MR. DOUGHERTY:** I guess I just wanted some

[1] clarification.

[2] **THE COURT:** He is going to turn over his client's
[3] mental history records. But he is going to look at them in
[4] their entirety and decide whether or not there are some things,
[5] some documents, some records within that bundle that he would
[6] like Judge Francis to say he doesn't have to turn over. And
[7] the rest of it he will turn over. He will turn it over if
[8] Judge Francis disagrees with him. So everything gets turned
[9] over unless Judge Francis says it doesn't.

[10] **MR. DOUGHERTY:** Thank you, your Honor.

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1	admonition 6:18 adopt 35:9	around 5:19,19;15:18; 28:25	C	25:33;25:34;2,2,14 claimed 24:13;28:3;32:14
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